Supreme Court, U.S.
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No. 98-1282

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANKS & SON, INC., on behalf of themselves and all others similarly situated

Petitioners,

v.

THE STATE OF WASHINGTON, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, AND OFFICE OF THE STATE TREASURER

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Commerce Clause requirement that state taxes be fairly apportioned is applicable to "regulatory fees" — that is, state exactions that are used to pay for regulatory activity.

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INTEREST OF THE *AMICUS CURIAE*

American Trucking Associations, Inc. (ATA), is a national trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry.[1] That industry consists of every type of motor carrier operation in the United States and includes tens of thousands of interstate for-hire carriers, private carriers, and leasing companies.

The interstate trucking industry traditionally has been one of the principal targets of discriminatory state taxation and regulation. As a result, ATA and its members have brought or participated in Commerce Clause challenges to a wide range of state taxes, fees, and regulations before this Court and other state and federal courts. Indeed, ATA was the lead plaintiff (appellant before this Court) in the case whose principles are most directly at issue in this appeal (*American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987) ("*Scheiner*")), and it has often litigated the identical "tax vs. fee" issue raised in this matter. *E.g.*, *American Trucking Associations, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991) ("*Secretary of State*"); *American Trucking Associations, Inc. v. Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993) ("*Secretary of Administration*"); *American Trucking Associations, Inc. v. New Jersey*, No. 011562-92 (N.J. Tax Ct. March 23, 1998), *appeal docketed*, No. A-6334-97T3F (N.J. Super. Ct., App. Div. July 15, 1998).

Moreover, despite ATA's and others' strenuous efforts to enforce *Scheiner*'s Commerce Clause standards, states and localities persist in imposing unapportioned, annual charges on interstate trucking operations. These governmental entities argue that the discriminatory and burdensome structure of these charges should be ignored on the ground that the charges involved are not taxes but

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[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus* or its members, made a monetary contribution to the preparation or submission of this brief.

"regulatory fees." ATA accordingly has a strong interest in the question presented by this case — whether the Commerce Clause's fair apportionment requirement ceases to apply to an exaction merely because the levy may be characterized as a regulatory fee.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

Following this Court's *Scheiner* decision in 1987, ATA hoped that states would recognize the decision's unequivocal condemnation of flat, annual charges on interstate trucking operations and quickly eliminate them. Instead, most states tried to evade *Scheiner's* principles and forced ATA to undertake an ongoing, decade-long litigation effort to enforce the Commerce Clause requirements that *Scheiner* articulated. *See, e.g., Kentucky v. American Trucking Associations, Inc.*, 746 S.W. 2d 65 (Ky. 1988); *Black Beauty Trucking, Inc. v. Indiana Dept. of Revenue*, 527 N.E. 2d 1163 (Ind. Tax Ct. 1988) ("*Black Beauty*"); *Secretary of State*, 595 A.2d 1014 (Me. 1991); *American Trucking Associations, Inc. v. State*, 556 N.W. 2d 761 (Wis. Ct. App. 1996), rev. denied, 560 N.W.2d 274 (Wis. 1996) ("*State*). All told, ATA has been forced to bring suit against 15 states challenging more than two dozen flat state taxes and fees imposed on interstate trucking.[2]

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[2] *American Trucking Associations, Inc. v. New Jersey*, No. 011562-92 (N.J. Tax Ct. March 23, 1998), *appeal docketed*, No. A-6334-97T3F (N.J. Super. Ct., App. Div. July 15, 1998) ($212-per-unit hazardous waste transporter fee) (N.J. Stat. Ann. § 13:1E-18); *American Trucking Associations, Inc. v. State*, 556 N.W. 2d 761 (Wis. Ct. App. 1996), rev. denied, 560 N.W.2d 274 (Wisc. 1996) ($400-per-company hazardous material transportation fee) (Wis. Admin. Code § SERB 4.03(2)(a)-(e)); *Westlake Transportation, Inc. v. Michigan Public Service Commission*, No. 95-15628-CM (Mich. Ct. Cl., October 13, 1995), appeal docketed, No. 216090 (Mich. App. Ct., Dec. 3, 1998) ($100-per-truck intrastate operating fee (Mich. Comp. Laws 478.2(1)) and $100-per-vehicle flat annual interstate registration fee (Mich. Comp. Laws 478.2(2)); *American Trucking Associations, Inc. v. New Hampshire*, No. 89-E-00405-B (N.H. Super. Ct., Merrimack Co., 1995) ($200-per-unit hazardous waste transporter fee (N.H. Rev. Stat. Ann. § 147-A:6, II) and $25-per-unit

hazardous material fee (reduced to $5-per-truck during the litigation) (N.H. Rev. Stat. Ann. § 21-P:20, IV)); *American Trucking Associations, Inc. v. Denn*, No. C2-95-4910 (Dist. Ct., Ramsey Cty., 1995) ($40-per-vehicle cab card fee (Minn. Stat. § 221.31)); *American Trucking Associations, Inc. v. New Jersey*, No. 001601 (N.J. Tax Ct., filed Feb. 17, 1994) (flat-per-company hazardous waste transporter business disclosure fee (N.J. Stat. Ann. §§ 13:1E-18 and 13:1E-126 et seq.)); *American Trucking Associations, Inc. v. Secretary of Admin.*, 613 N.E. 2d 95 (Mass. 1993) ($7-per-truck license fee and $7-per-truck "user of special fuels" license fee (Mass. Gen. Laws ch. 62C, § 67) and $200-per-truck hazardous waste carrier fee (Mass. Gen. Laws ch. 21C, § 7)); *American Trucking Associations, Inc. v. Smith*, No. 89-0385 (Ark. Chancery Ct., 1992) ($10-per-truck fuel decal tax (Ark. Code Ann. § 26-55-708 (2)); *American Trucking Associations, Inc. v. Cowan*, No.TX91-01608 (Ariz. Chancery Ct., 1992) ($125-per-truck cargo tank fee (Ariz. Rev. Stat. § 28-3005) and $100-per-carrier, $25-per-truck hazardous and special waste transporter fees (Ariz. Rev. Stat. §§ 28-2421 and 28-2422)); *Marx v. American Trucking Associations, Inc.*, 600 So. 2d 212 (Miss. 1992) ($12-per-truck fuel identification fee (Miss. Code Ann. § 27-61-5(1)) and $13-per-truck bingo stamp fee (Miss. Code Ann. § 77-7-119)); *American Trucking Associations, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991) ($25-per-truck hazardous waste fee (Me. Rev. Stat. Ann. tit. 29 § 246-D)); *American Trucking Associations, Inc. v. New Hampshire*, No. 89-E-00405 (N.H. Super. Ct., Merrimack Co., 1991) ($20-per-truck decal fee (N.H. Rev. Stat. Ann. § 260:52, V (Supp. 1988))); *American Trucking Associations, Inc. v. Secretary of State*, No. CV-89-410 (Me. 1990) ($15-per-truck decal fee (Me. Rev. Stat. Ann. tit. 29 § 246-A)); *American Trucking Associations, Inc. v. Conway*, 566 A.2d 1323 (Vt. 1989) ($50-per-truck fuel decal fee (23 Vt. Stat. Ann. tit. 23 § 415 (1982)) and $50-per-truck retaliatory fee (Vt. Stat. Ann. tit. 23 § 3007 (1982))); *American Trucking Associations, Inc. v. Goldstein*, 541 A.2d 955 (Md. 1988) ($25-per-truck fuel decal fee (Md. Ann. Code art. 81, § 423(a)(1987 Cum. Supp.))); *Commonwealth Transportation Cabinet v. American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988) ($150-per-truck supplemental highway use tax (Ky. Rev. Stat. Ann. § 1388.660(4-7)); *American Trucking Associations, Inc. v. Gray*, 746 S.W.2d 377 (Ark. 1988) ($175-per-truck highway use equalization tax (Ark. Code. Ann. §§ 75-817 and 75-819)); *Black Beauty Trucking, Inc. v. Indiana Dept. of Revenue*, 527 N.E.2d 1163 (Ind.Tax Ct., 1988) ($50-per-truck supplemental highway use tax (Ind. Code § 6-6-8-1 et seq.); *American Trucking Associations, Inc. v. Kline*, 9 N.J.Tax 631 (N.J., 1987) ($25-per-truck fuel

In those cases, states have attempted to exploit every ambiguity in *Scheiner*. For example, states have contended that the decision applies only to situations where a state, by means of other tax reductions, exempts local interests from the impact of the flat charge — a blatant mischaracterization of *Scheiner*'s scope. *See* 483 U.S. at 273-75.[3] And states have attempted, as in this case, to circumvent *Scheiner*'s apportionment requirement by arguing that the decision applies only to taxes and not fees.

The "tax versus fee" argument has, therefore, been expressly considered by courts in ATA cases. Rejecting the argument, the Supreme Judicial Court of Massachusetts found that "[i]t is of no relevance what label is attached to the assessment imposed by a State if it actually discriminates against interstate commerce." *Secretary of Administration*, 613 N.E.2d at 99 n. 9. Likewise, the Supreme Judicial Court of Maine held that "a tariff such as the one imposed here is forbidden if it produces the prohibited discriminatory effects on interstate commerce, whether designated as a 'fee' or a general revenue 'tax.'" *Secretary of State*, 595 A.2d at 1016. Accordingly, the decision below directly conflicts with the decisions of the highest courts of two states, and review by this Court is needed to settle the standard of Commerce Clause review governing "fees" that affect interstate commercial activities.

Moreover, the issue of the appropriate Commerce Clause standard to be applied to "fees" is now pending in two cases challenging impositions by the State of New Jersey. In a challenge to a $212-per-unit annual hazardous waste transporter fee (which, like the Washington fee, funds, in part, roadside safety inspections), the New Jersey Tax Court rejected the State's claim

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decal fee (N.J. Stat. Ann. § 54:39A-10)).

[3] As Petitioners note (Pet. at 26), states have also argued that apportionment was impracticable, that it was inappropriate because the charge involved was not for highway maintenance or construction, and that their charge, as a "user fee," need not be apportioned. *See e.g. State*, 566 N.W. 2d at 767-68; *Secretary of State*, 595 A.2d at 1016; *Secretary of Administration*, 613 N.E.2d at 101-03.

that the charge was a regulatory fee that need not be apportioned. The Court held that "[i]t is irrelevant whether I call the transporter fees fees or taxes under Commerce Clause jurisprudence. It is clear in *Scheiner* that the United States Supreme Court looked not at the formal designation or character of a state imposition as being a 'fee or tax,' but instead to the affect of that imposition on interstate commerce . . ." *American Trucking Associations, Inc. v. New Jersey*, No. 011562-92 (N.J. Tax Ct. March 23, 1998) appeal docketed, No. A-6334-97T3F (N.J. Super. Ct., App. Div. July 15, 1998).

An identical "tax versus fee" issue is pending in a concurrent challenge to New Jersey's flat, annual per-company hazardous waste transporter business disclosure fee (N.J.S.A. 13:1E-18(a)). *American Trucking Associations, Inc. v. New Jersey*, No. 001601-94 (N.J. Tax Ct.). And recently, the Michigan Court of Claims rejected an ATA challenge to a $100-per-truck intrastate regulatory fee that affects interstate commerce, expressing the view that state regulation of safety standards "is not amenable to a fee structure based on apportionment by usage." *Westlake Transportation, Inc. v. Michigan Public Service Commission*, No. 95-15628-CM (Mich. Ct. Cl., (Oct. 13, 1998)), appeal docketed, No. 216090 (Mich. App. Ct., Dec. 3, 1998). Consequently, the case below presents a substantial, recurring legal issue that demands this Court's attention.

Finally, many other substantial flat, annual charges, which are not subject to current challenge, are being imposed on interstate trucking operations (and other interstate businesses). *See* Petition at 24 n. 17. Without guidance from this Court on the "tax versus fee" issue, the chances of eliminating those discriminatory charges, without years of costly litigation, will be slim. Indeed, given the recalcitrant attitude that many states have taken regarding flat, annual taxes and fees, it can be reasonably expected that those states will be emboldened by the decision below to enact new flat, annual "fees" on the interstate trucking industry and other interstate businesses. States have a powerful incentive to utilize flat charges to export an unfair portion of their tax burden to out-of-state interests; in *Scheiner* (483 U.S. at 276), the Court recognized that the flat charges effectively cost interstate highway users five times as much as local users. It is again, therefore, critically important

that this Court clarify the Commerce Clause standards applicable to state "fees" to prevent further mischief in this area.

I. LOWER COURTS NEED GUIDANCE ON THE RELEVANCE AND APPLICATION OF THE "TAX VERSUS FEE" DISTINCTION

Whether a particular exaction constitutes a "tax" or a "fee" is a recurring question that arises in a wide variety of contexts. For example, this Court recently had to determine whether the federal Harbor Maintenance Tax, as it applies to exports, constituted a tax prohibited by the Export Clause of the Constitution (U.S. Const. art. I, § 9, cl. 5), or a fee that fell outside the constitutional prohibition. *United States Shoe Corp. v. United States*, 118 S. Ct. 1290 (1998); *see also Turpin v. Burgess*, 117 U.S. 504 (1886); *Pace v. Burgess*, 92 U.S. 372 (1876). Similarly, the Court has had to determine whether charges by federal agencies are authorized fees for benefits granted[4] or are in substance taxes that Congress can impose only by the exercise of its taxing power. *Federal Power Commission v. New England Power Co.*, 415 U.S. 345 (1974); *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974). It has had to determine whether federal registration fees imposed on civil aircraft constituted taxes that arguably violated the states' constitutional immunity from federal taxation, or were reasonable user fees that were not barred by that doctrine. *Massachusetts v. United States*, 435 U.S. 444 (1978). And, over a century ago, the Court had to determine whether per-passenger charges on those transporting immigrants into the country constituted an allegedly nonuniform exercise of the federal taxing power, see U.S. Const. art. I, § 8, cl. 1, or a fee for services rendered that was not subject to the constitutional restraint on that power. *Head Money Cases*, 112 U.S. 580 (1884). *Cf. United States v. Sperry Corp.*, 493 U.S. 52 (1989) (distinguishing charges that constitute governmental takings under Due Process Clause from reasonable user fees).

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[4] See 31 U.S.C. § 9701 (delegating to administrative agencies the authority to assess charges in situations where a "service or thing of value" is provided by the agency).

Other courts have addressed similar questions in yet other contexts. *See, e.g., San Juan Cellular Phone Co. v. Public Service Comm'n*, 967 F.2d 683 (1st Cir. 1992) (Breyer, J.) (determining whether an exaction is a tax, which may not be challenged in federal court under the anti-tax injunction act, or a fee, which may be so challenged); *Union Pacific Railroad Co. v. Public Utility Comm'n*, 899 F.2d 854 (9th Cir. 1990) (determining whether a levy is a tax subject to the antidiscrimination provisions of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 1103(b), or a fee not subject to the Act's antidiscrimination provisions); *In re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir. 1986) (determining whether a levy is a tax subject to priority in bankruptcy proceedings or a fee not entitled to such priority).

In each of these cases, even though the question is nominally the same—whether the particular exaction at issue is a tax or a fee—the underlying reasons for (and the legal consequences of) characterizing the exaction as a tax or a fee are often quite different and unrelated to one another. Thus, the characterization of an exaction as a tax rather than a fee resolves such disparate questions as whether the exaction should be subject to constitutional restraints on federal taxation of exports (*United States Shoe*); whether the exaction constitutes an impermissible levy by the Federal Government on the states (*Massachusetts*); whether the exaction must conform to constitutional uniformity principles (*Head Taxes*); whether the exaction may be challenged in federal court (*San Juan Cellular*); and whether the exaction is subject to priority in bankruptcy proceedings (*Jenny Lynn Mining*).

Because each of these inquiries is informed by different constitutional and statutory provisions and the discrete policies underlying them, it would be surprising if the line drawn between a tax and fee in one context would provide controlling or even meaningful guidance to the appropriate line, if any, between a tax and a fee in another context. For example, the policies underlying the tax injunction act—to prevent federal interference with the lifeblood of state government (see *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981))—have little to do with the policies underlying the limited statutory grant to federal

agencies to assess charges that provide "'value to the recipient.'" *National Cable*, 415 U.S. at 341 (quoting 31 U.S.C. § 483a).

As Justice Breyer observed when he was sitting on the First Circuit, in rejecting the argument that an exaction that does not provide individual "value to the recipient" must be deemed a tax for all purposes:

> Deciding whether (or to what extent) a particular fee provides such individual value could make sense in the context of such a statute.
>
> Here, however we are dealing with a very different statute, a "tax injunction" statute, which has as its objective to prevent a taxpayer from "throwing" state "tax administration . . . into disarray" as the taxpayer tries to "escape . . . ordinary procedural requirements" by going to federal court for an injunction, perhaps thereby "damaging" the "State's budget" and "shifting to the State . . . the risk of taxpayer insolvency." Whether a particular agency charge defrays the administrative costs of regulating a single regulated firm or a class of such firms has little, or nothing, to do with this problem. Hence, the Court's limiting language in *National Cable* is irrelevant here.

San Juan Cellular, 967 F.2d at 10-11 (ellipses in original) (quoting *Rosewell v. La Salle National Bank*, 450 U.S. 503, 527 (1981) (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 (1971) (Brennan, J., concurring in part and dissenting part))) (additional citation omitted).

This Court has likewise recognized that the question whether an exaction should be considered as a tax or fee for constitutional or other purposes is an inquiry that depends on the context in which the question arises, and that the lines drawn in one context do not determine the lines drawn in another. Thus in *United States Shoe*, which involved the question whether an exaction was a tax for purposes of the limitation on federal taxation of exports, the Court distinguished cases that had drawn a line between taxes and fees under the Takings Clause (*Sperry*), the intergovernmental immunity doctrine (*Massachusetts*), and the Commerce Clause (*Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405

U.S. 707 (1972))[5]: "Those decisions involved constitutional provisions other than the Export Clause . . . and thus do not govern here." *United States Shoe*, 118 S. Ct. at 1295.

The Washington Supreme Court utterly ignored the context-specific nature of the "tax versus fee" inquiry, and the necessity of identifying the constitutional or statutory concerns at stake, in mechanically determining that the exaction at issue was a "regulatory fee" and, "therefore" (according to the court) not subject to the Commerce Clause requirement that taxes be fairly apportioned and internally consistent. Pet. App. at 10a-16a. The court relied on cases arising under a variety of disparate and unrelated provisions in concluding that the exaction constituted a "regulatory fee" that was insulated from the Court's Commerce Clause jurisprudence applicable to state taxing measures. See Pet. App. at 11a-12a (discussing *Union Pacific*, arising under the Railroad Revitalization and Regulatory Reform Act); Pet. App. at

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[5] It is worth observing that, in the Commerce Clause context, the only distinction the Court has ever drawn between a tax and fee is a distinction between general revenue measures, on the one hand, and user fees, on the other, and then only to point out that user fees are subjected to a *greater* degree of constitutional scrutiny than are general revenue measures. As the Court observed in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), with regard to "'user' fees or 'taxes' that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services" (*id.* at 621):

> "[s]uch imposition although termed a tax, cannot be tested by standards which generally determine the validity of taxes." Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific, quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged do not appear to be manifestly disproportionate to the services rendered . . . ."

Id. at 622 n.12 (citation omitted; ellipses in original). There is no suggestion here that the exaction at issue is a user charge in the sense employed by the Court. Moreover, even if it were, it would expose the charge to increased — not lesser — constitutional scrutiny, as the court below suggested.

12a (discussing *National Cable*, arising under the Independent Offices Appropriation Act, 31 U.S.C. § 583a); Pet. App. at 12a-13a (discussing *Covell v. City of Seattle*, 127 Wash. 2d 874, 905 P.2d 324 (1995), arising under the Washington State constitutional requirement of uniformity and equality in property taxation).

The court below therefore failed to pay attention to the rationale, if any, for excluding the exaction at issue from Commerce Clause scrutiny applicable to taxes. The court's failure in this regard is most dramatically illustrated by its heavy reliance on the distinction purportedly drawn between taxes and fees in Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation,"* 87 MICH. L. REV. 138 (1988). The court declared that the article:

> identified "professional and similar licensing fees that are imposed by every state" as possible victims of strict application of internal consistency to nondiscriminatory regulatory fees.
>
> > Many of these fees are flat and unapportioned, and, for that reason, could be challenged under the "internal consistency" rationale. . . . One feature of these licensing fees, however, arguably insulates them from challenge under the "internal consistency" doctrine. In contrast to . . . exactions . . . presumed to be imposed for general revenue purposes pursuant to the state's taxing power, the levies considered here are presumed to be imposed for regulatory purposes pursuant to the state's police power. However thin that distinction may be in some cases, it is a distinction the law recognizes, and the question for present purposes is whether it is a distinction that makes a constitutional difference insofar as the commerce clause (and "internal consistency") analysis is concerned.

Pet. App. at 16a (quoting Hellerstein, *supra*, 87 MICH. L. REV. at 156 (omission of footnotes and ellipses in original)).

While the court relies on the distinction the article identifies between exactions imposed for general revenue purposes and levies imposed for regulatory purposes in support of its conclusion that the latter need not satisfy the "internal consistency" test, *it*

completely ignores the article's analysis of the issue, which flatly contradicts the court's conclusion. In answering the question posed — whether the "tax versus fee" distinction is one that "makes a constitutional difference insofar as the commerce clause (and 'internal consistency') analysis is concerned" — the article declares:

> Although the Court's formal criteria for evaluating commerce clause challenges to state regulations are not identical to its criteria for evaluating commerce clause challenges to state taxation, *there is no reason to believe that a regulatory license fee would be immune from the "internal consistency" requirement merely because it constituted an exercise of the regulatory power rather than an exercise of the state's taxing power.* Surely the evils that the "internal consistency" test was designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power. In each case, the licensee carrying on his trade in more than one jurisdiction bears a greater financial burden than his intrastate competitor merely because he is engaging in interstate commerce with the consequent interference with free trade among the states. *Hence, there does not appear to be any sound policy basis for distinguishing the "fee" from the "tax" cases insofar as the application of the "internal consistency" doctrine is concerned.*

Hellerstein, *supra*, 87 MICH. L. REV. at 157 (emphasis supplied; footnote omitted). In short, rather than supporting the court's conclusion, the article's analysis demonstrates that there is no sound basis for declining to apply the Commerce Clause's fair apportionment requirement, and its related "internal consistency" test, to the "regulatory fee" at issue here.

The Washington Supreme Court is not alone in its misguided reliance on cases from other contexts to resolve the question whether the Commerce Clause restraints imposed on state taxes apply to exactions that may be characterized as "regulatory fees." *See, e.g., V-1 Oil Co. v. Utah State Dept. of Public Safety*, 131 F.3d 1415 (10th Cir. 1997) (relying on unrelated state law precedents in holding that an exaction should be analyzed as a "regulation" rather than a "tax" under the Commerce Clause); *Interstate Towing Ass'n v. Cincinnati*, 6 F.3d 1154 (6th Cir. 1993)

(same). Moreover, the Washington decision is in conflict with decisions of other courts that have properly recognized the irrelevance of the tax-regulatory fee dichotomy for purposes of analyzing whether a flat, annual charge on interstate trucks violates the Commerce Clause. *See, e.g., Secretary of Administration*; *Secretary of State*.

Consequently, this Court's guidance is sorely needed to assure that the question whether an exaction is subject to the restraints that the Commerce Clause imposes on the exercise of state tax power is resolved in light of the principles that underlie the Court's Commerce Clause jurisprudence and not by reference to cases from other, unrelated contexts. Courts need to be reminded, as this Court observed many years ago, that "we must regard things rather than names" (*Fairbank v. United States*, 181 U.S. 283, 304 (1901)), in undertaking the constitutional analysis.

II. THE COMMERCE CLAUSE'S FAIR APPORTIONMENT REQUIREMENT APPLIES EQUALLY TO TAXES AND FEES

A. The Validity of a State Charge Under the Commerce Clause is Based Upon its Practical Effect on Interstate Commerce

In recent decades, this Court has adjudicated virtually every Commerce Clause challenge to a state charge (whether denominated a tax or a fee) under the four-prong analysis of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (a charge will pass muster only if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.").

In applying *Complete Auto*'s analysis, this Court has also made clear that "the permissibility of state taxation [is] based upon its actual effect rather than its legal terminology" (*id.* 439 U.S. at 281), noting that "a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Id.* at 288. *See also Commonwealth Edison*, 453 U.S. at 616 ("In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry'

focusing on 'the practical effect of a challenged tax.'") (citations omitted).

It is beyond dispute that flat, annual charges have the same impact on interstate motor carriers (and on other interstate businesses) no matter what the charges are denominated. This is so because the level of the fee is "not keyed to the interstate truckers' actual use of State highways, facilities, or services." *Secretary of Administration*, 613 N.E. 2d at 100. Consequently, "an interstate carrier will be subject to the [flat] taxes of several States, even though his entire use of the [States'] highways[,] [services, or facilities] is not significantly greater than that of intrastate operators who are subject to only one [flat] tax." *Scheiner*, 483 U.S. at 292 (quoting *Capitol Greyhound Lines v. Bryce*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)). This is true, of course, no matter what a state charge is called and no matter what the uses to which the state puts the charge's proceeds.

For example, whether called a regulatory fee, a highway user tax or fee, or a general revenue tax, a flat, annual $50 per-truck charge costs an interstate trucker as much as $2,450 (to operate in the 48 contiguous states and the District of Columbia), while costing a purely intrastate trucker only $50. This is so even though the two trucks' level of operations are identical. This "cumulative effect does not result from the mileage or distance traveled, but from the interstate character of the journey." *Scheiner*, 483 U.S. at 284 n.16 (quoting Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253, 1269 (1940)).

The result of this cumulative burden is that some entities engaged in interstate commerce will be forced to draw back from full participation in the interstate market. In *Scheiner*, the Court observed that flat, annual charges have a "forbidden impact on interstate commerce because [they] [] exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Scheiner*, 483 U.S. at 286-87. Consequently, flat annual charges of all sorts do not "maintain state boundaries as a neutral factor in [a taxpayer's] economic decisionmaking" (*id.* at 283). Such charges therefore offend the Commerce Clause.

Moreover, any type of unapportioned annual charge "'bear[s] more heavily in the aggregate on a firm that [does business] in many places than on a firm otherwise identical . . . that [does business] in only one place.'" *Scheiner*, 483 U.S. 285 n.20 (citation omitted). As this Court explained in *Scheiner*, "in the general average of instances, the privilege is not as valuable to the interstate carriers" because "the very nature of the market that interstate operators serve prevents them from making full use of the privilege of doing business for which they have paid the State." *Id.* at 284 n.16, 291. Consequently, interstate motor carriers and other interstate businesses, under any type of a flat annual charge, inherently pay more than their fair share of a state's costs. *See Scheiner*, 483 U.S. at 296 ("[I]mposition of [a] flat tax[] for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause.").

Finally, it is also indisputable that any type of flat charge fails *Complete Auto*'s fourth prong requirement that taxes be "fairly related to services provided by the state." *Complete Auto*, 430 U.S. at 279. With respect to taxes, this requirement has been interpreted to require that "the measure of the tax must be reasonably related to the extent of the [taxpayer's] contact, since it is the activities or presence of the taxpayer in the State that may be properly made to bear a just 'share of state tax burden.'" *Commonwealth Edison,* 453 U.S. at 626. When taxes "are assessed in proportion to a taxpayer's activities or presence in a State, [a] taxpayer is shouldering its fair share" of the state's tax burden. *Id.* at 627. Conversely, "'when the measure of a tax bears no relation to the taxpayer's presence or activities in a State, a court may properly conclude . . . that the State is imposing an undue burden on interstate commerce.'" *Scheiner,* 483 U.S. at 291 (quoting *Commonwealth Edison*, 453 U.S. at 629.) Indeed, as we have noted (at note 5, *supra*), under the fourth prong fees are subject to an even more demanding Commerce Clause analysis than are general revenue taxes.

In practice, unapportioned annual charges, whether labeled a tax or a fee, expose interstate motor carriers (and other forms of interstate business) to duplicative taxation. Such levies also inherently place a disproportionate and discriminatory share of a

state's tax or regulatory cost on out-of-state taxpayers. Such flat charges therefore unquestionably violate the Commerce Clause.

B. Because the Practical Effect of Flat Taxes and Fees Under the Commerce Clause is the Same, There is no Basis for Applying a Different Legal Analysis

Before allowing a state to impose a flat, annual charge that inherently discriminates against and burdens interstate commerce, it would be reasonable to expect some explanation as to why such a charge was appropriate in the context of a "regulatory" or "user" fee — an explanation, that is, of what is it about a regulatory or user fee that makes a flat charge any less discriminatory or burdensome, less of a threat to the free movement of interstate commerce, or more difficult to apportion than a general revenue tax. But while the Supreme Court of Washington alludes to "policy reasons" that justify a different Commerce Clause standard for regulatory fees, it never explains those reasons. Instead, it speculates that applying an apportionment requirement could jeopardize other forms of flat state charges (Pet. App. at 15a) and cites out-of-context cases holding that the burden on interstate commerce from "a direct tax" is "inherently greater" than from "police power regulations." *Id.* at 11a.

The Court's concern about the potential invalidation of all flat charges is simply wrong. Per-use flat charges, such as the enplaning fee in *Evansville*, or toll charges or head taxes, are self-apportioned (each use triggers a separate fee payment) and therefore do not violate the Commerce Clause. Such fees are "directly related, in purpose and amount, to the use of a service or privilege" (*Secretary of Administration*, 613 N.E.2d at 102), making each feepayer's payment equivalent to the approximate value of the services received from the state. Likewise, flat administrative fees also would not offend the Commerce Clause when they simply recoup the state's true administrative cost of doing a particular administrative task (*e.g.*, fees for processing a license application). Under a true administrative fee, the state's cost would be the same for each feepayer, would not vary with the level of a feepayer's activity in the state, and would be in an amount appropriate to provide compensation for an identifiable, specific administrative service.

Other flat, annual "fees" imposed to reimburse a state for generic costs of regulation or providing a service or facility must be apportioned to protect interstate commerce against potential multiple taxation. State regulatory programs or generic services whose costs vary with the level of a feepayer's in-state activity (*e.g.*, conducting random inspections) involve charges very much akin to general revenue taxes, a point that is discussed below. Feepayers in such circumstances simply contribute to the costs of a generic government program. As with general revenue taxes, the only fair way to distribute the cost of such programs is to apportion them according to the feepayer's level of activity or presence in the state. Consequently, the Washington court's supposition that regulatory fees do not as directly affect interstate commerce as do general revenue taxes is simply wrong. A $50 per-truck charge labeled a regulatory user fee is just as burdensome to interstate motor carriers and just as much a threat to interstate commerce as a $50 per-truck charge labeled a highway tax.

Finally, it is worth noting that apportioning a regulatory or user fee is no more difficult than apportioning a general revenue tax. In fact, it should be easier for a state to apportion a regulatory or user fee according to usage of state services or facilities than it is to apportion a general revenue tax that is imposed to recoup costs of general governmental benefits. *See Commonwealth Edison*, 453 U.S. at 623 (noting that a general revenue tax "is not an assessment of benefits"). In any event, apportionment is not based on identifying each cost imposed on a state by particular activities and then apportioning those costs to specific feepayers. Rather, apportionment is instead based on the level of activities or presence in the state of the taxpayer. *See id.* at 626 ("a tax [must be] reasonably related to the extent of the [taxpayer's] contact [with the taxing State], since it is the activities or presence of the taxpayer in the State that may properly be made to pay a 'just share of state tax burden.'") (citation omitted). It is no more difficult to apportion a fee (based on the extent of in-state activity) than it is a tax.

C. Separate Commerce Clause Standards for Fees and Taxes Would Needlessly Complicate Judicial Review, Leading to State Manipulation of Charges and Inconsistent Results

State exactions do not fall into neat, well-defined tax and fee categories. States impose many types of charges for many different purposes. Some charges are broad-based taxes that generate revenue for general governmental purposes (*e.g.*, personal and corporate income taxes, sales and use taxes). Others are more selective taxes that likewise generate revenue for general governmental purposes (*e.g.*, alcohol and tobacco taxes). Still others are selective charges (taxes and fees) that are earmarked for a particular governmental purpose (*e.g.*, highway use taxes earmarked for road construction and maintenance, regulatory fees earmarked for funding state regulatory services). And finally, there are per-use fees and administrative fees that are charges for individualized uses of specific state services or facilities (*e.g.*, tolls, administrative filing fees).

It is not always easy to determine exactly where a state charge falls along the "tax versus fee" continuum. For example, the charges reviewed in *Scheiner* (one denominated a tax and one a fee), were fees in the same sense as was the Washington per-truck charge at issue in this case. The *Scheiner* charges were imposed on truck owners to pay general highway costs incurred by the state because of the operation of their vehicles (*see Scheiner*, 483 U.S. at 270-71), while the Washington fees were imposed on truck owners to fund general state safety activities related to the operation of their trucks. Yet, although there is virtually no practical difference between the types of charges, the Washington Supreme Court categorized them differently and in a manner that ultimately controlled, according to that court, their constitutionality under the Commerce Clause.

Basing the validity under the Commerce Clause of a state exaction on its categorization rather than its practical effect would add a complicated layer of analysis to constitutional review. As this Court recognized in *Complete Auto*, such a formalistic view would "operate only as a rule of draftsmanship, and serve[] only to distract the courts and parties from their inquiry into whether the

challenged tax produced results forbidden by the Commerce Clause." *Complete Auto*, 430 U.S. at 285. Undoubtedly, courts would reach inconsistent conclusions on charges that imposed "no real economic difference" on the parties. *Id.* at 284. Whether a state charge is a tax or fee simply does "not address the problems with which the Commerce Clause is concerned." *Id.* at 288.

Moreover, such formalism invites states to attempt to manipulate the legal analysis. State legislatures are under pressure from local interests to export as much of their tax and regulatory cost burden as possible to out-of-state entities. Flat, annual charges are a proven tool for just such discrimination. If flat highway taxes are unconstitutional, but flat regulatory fees are permissible, it will be a simple matter for a state to break down a general highway tax into a number of so-called regulatory fees.

For example, highway taxes fund a variety of state activities, including capital outlays for road construction and improvements; maintenance costs to keep highways in a usable condition; highway and traffic service costs, such as traffic control devices, snow removal, and the like; administrative costs related to general highway planning and research; highway law enforcement and safety expenditures, including traffic supervision, vehicle inspection, and enforcement of size and weight limitations; debt service costs; and intergovernmental transfers for local road-related projects. U.S. Department of Transportation, *Highway Statistics 1997*, IV-5 – IV-6 (1997). It would not be difficult for a state to replace a flat unconstitutional general highway tax (*e.g.*, the Pennsylvania $36 per-axle tax or $25 marker fee) with a series of flat regulatory/user fees (a safety inspection fee, a hazardous material enforcement fee, a size and weight inspection fee, a rest area fee, a snow removal fee, and so on). Indisputably, the impact of such fees would be the same on interstate commerce as an identical exaction labeled a highway tax.

III. A *PIKE* ANALYSIS IS NOT APPROPRIATE FOR REGULATORY FEES

Even if the distinction between a tax and a "regulatory fee" were deemed to have some bearing on the standards for adjudicating the constitutionality of an exaction under the Commerce Clause, it does not follow, as the court below

concluded, that the appropriate standards are those stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In *Pike*, this Court articulated the now-familiar balancing test that it has frequently applied to state statutes that *regulate* interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike, 397 U.S. at 142 (citations omitted).

On its face, the open-ended balancing test that has been used to determine the constitutionality of state *regulations* of interstate commerce has no application to fees that do not themselves have any regulatory content. No matter what the revenue they generate is used for, the "regulatory fees" at issue here do not function as regulations. The only thing that the fees require is that the truckers pay money to the state. There is simply no "putative local benefit"—the effect of a substantive regulation under the *Pike* test—to balance against the burden of the tax.[6]

Moreover, even if the *Pike* test were applicable to the exactions at issue here, it is plain that the court below misapplied it. Under *Pike*, a regulation must "regulate[] evenhandedly" (*i.e.*, be nondiscriminatory) before a court may "balance" the burden the regulation imposes against the benefit it provides. But the flat levy at issue here is clearly discriminatory. However one may characterize this levy (as a tax, a regulatory fee, or something

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[6] In this respect, the regulatory fee at issue here is easily distinguishable from a fee that itself may function as a regulation, *e.g.*, a progressive fee calibrated to the amount of pollutants a feepayer discharges into the environment. Such a fee does not merely raise revenue; it also directly affects the level of pollutants discharged.

else), and whatever test of constitutionality may govern its validity, it is indisputable that the levy is unfairly apportioned. Indeed, the State conceded as much (see Pet. App. at 15a), contending instead that the fair apportionment requirement was inapplicable. But this Court has flatly stated that "[a] tax that unfairly apportions income from other States is a form of discrimination against interstate commerce." *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). It is therefore apparent that the flat levy at issue here cannot satisfy the threshold requirement of the *Pike* test because it is structurally discriminatory and thus not "evenhanded."

Furthermore, even if one overlooked the fact that flat levies by their very nature discriminate against interstate commerce, the levy at issue here would *still* flunk the *Pike* balancing test. Under *Pike*, no burden on interstate commerce will be tolerated if the state's purpose in the regulation can "be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. Here, of course, the State undeniably could fund its motor carrier safety enforcement program with a fairly apportioned levy. Hence a reasonable, nondiscriminatory alternative to the State's flat levy clearly exists. Accordingly, the Court's review of this case is needed to confine the *Pike* balancing test within its appropriate bounds and to assure that, within those bounds, the *Pike* analysis is properly construed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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